

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

MARGARET HARDMON,

Plaintiff,

v.

NO. 2:97CV32-S-B

CITY OF CLARKSDALE, MISSISSIPPI, et al.,

Defendants.

OPINION

In this case, plaintiff seeks relief based on defendants' alleged arbitrary and capricious behavior in connection with her termination from employment. Defendants removed this action from the Circuit Court of Coahoma County, Mississippi, after plaintiff amended her complaint to add the following claims:

30. The defendants' actions and conduct in terminating plaintiff's employment...on the ground of excessive absenteeism when other police officers similarly situated were absent from work as much or more than plaintiff constitutes arbitrary and capricious conduct, is clearly erroneous both in law and fact, and is contrary to the overwhelming weight of the evidence.

\* \* \*

48. Defendants negligently and carelessly terminated plaintiff for absences covered by the FMLA [Family Medical Leave Act] when she was off to care for her mother who had cancer.

49. Defendants were guilty of negligence under Mississippi law for failing to comply with the statutory provisions of the FMLA.

50. Plaintiff specifically disclaims any intent to plead a federal cause of action or claim arising under the FMLA. This cause of action arises solely under the laws of the State of Mississippi for the defendants' negligent failure to comply with the

provisions of the FMLA. The violation of a statute (state or federal) is negligence per se under Mississippi law.

In defendants' view, these additions state claims under the Equal Protection Clause of the Fourteenth Amendment and the Family Medical Leave Act, thereby making this action removable under this court's federal question jurisdiction.

Presently before the court is plaintiff's motion to remand. Having carefully considered the matter, the court is of the opinion that the motion is well taken. Although paragraph 30 uses language generally associated with a claim under the Equal Protection Clause, it contains nothing else to suggest that plaintiff is seeking relief under the Constitution. Defendants maintain that "the fact that the Plaintiff does not claim that she was treated differently from similarly situated police officers based on her sex or race, does not mean she is not making an equal protection claim under the United States Constitution...." The court begs to differ. Unless plaintiff claims she was treated differently because of her inclusion in a group protected by the Fourteenth Amendment, she cannot possibly be asserting an equal protection claim. She has specifically disavowed any intention to make such an argument, and therefore, defendants cannot invoke this court's subject matter jurisdiction on that basis.

As to plaintiff's claim for negligence per se based on defendants' alleged violation of the FMLA, the court reaches the same conclusion. With plaintiff's specific disclaimer, the court can draw only one conclusion: plaintiff is not seeking any relief under the FMLA. In that situation, no federal question is raised.

The court does not believe, however, that plaintiff is entitled to an award of costs and attorney's fees under section 1447 for defendants' removal of this action. That decision lies completely within this court's discretion, and though the court finds it has no subject matter

jurisdiction over plaintiff's claims, it cannot state that this cause was removed improvidently and without justification. After all, plaintiff chose to use equal protection type language and to mention the FMLA in the amended complaint. Under those circumstances, defendants can hardly be faulted for trying.

An appropriate order shall issue.

This \_\_\_\_\_ day of May, 1998.

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CHIEF JUDGE